

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ANDREW TORO,

Plaintiff,

-v-

THE TOPATO CORPORATION,

Defendant.

23-CV-2399 (JPO)

ORDER

J. PAUL OETKEN, District Judge:

This action is dismissed without prejudice for failure to prosecute. On March 21, 2023, Plaintiff Andrew Toro sued Defendant The Topato Corporation, asserting state and federal claims. (See ECF No. 1.) On October 26, 2023, the Court directed Plaintiff to advise the Court in writing why Plaintiff had failed to serve the summons and complaint on Defendant within the ninety-day period, or, if Defendant had been served, when and in what manner such service was made. (See ECF No. 5.) The Court warned Plaintiff that if no written communication was received by November 9, 2023, showing good cause why such service was not made within ninety days, the Court would dismiss this case.

Federal Rule of Civil Procedure 41(b) authorizes a district court to dismiss an action “if the plaintiff fails to prosecute or to comply with the rules or a court order.” *Baptiste v. Sommers*, 768 F.3d 212, 216 (2d Cir. 2014). It is settled that Rule 41(b) “gives the district court authority to dismiss a plaintiff’s case *sua sponte* for failure to prosecute.” *LeSane v. Hall’s Sec. Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001). Dismissal without prejudice is appropriate here. Plaintiff was “given notice that further delay would result in dismissal,” *U.S. ex rel. Drake v. Norden Sys., Inc.*, 375 F.3d 248, 254 (2d Cir. 2004), and there is prejudice where Plaintiff has caused an “unreasonable delay.” *Lesane*, 239 F.3d at 210. Dismissal without prejudice appropriately

strikes a balance “between alleviating court calendar congestion and protecting a party’s right to due process and a fair chance to be heard.” *Id.* at 209.

Accordingly, this action is dismissed without prejudice to refiling.

The Clerk of Court is directed to close this case.

SO ORDERED.

Dated: December 5, 2023  
New York, New York



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J. PAUL OETKEN  
United States District Judge